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No. 84-335

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 31, 1984
CERTIORARI GRANTED OCTOBER 29, 1984

TABLE OF CONTENTS*

Relevant Docket Entries 1

Complaint 19

Answer 25

United States v. *David T. Dellinger, et al.*, No. 69 CR 180 (N.D. Ill., Feb. 20, 1970) 30

United States v. *Felix Lindsey O'Neal*, No. KC-CR-1204 (D. Kan., Sept. 1, 1970) 38

Order of the Supreme Court Granting Certiorari ... 41

*The opinions of the district court and the court of appeals are printed in the appendices to the petition for writ of certiorari and have not been reproduced.

UNITED STATES DISTRICT COURT

C.A. 72-1920

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, L. PATRICK GRAY, 3RD, INDIVIDUALLY AND AS ACTING DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JOHN N. MITCHELL, INDIVIDUALLY AND AS FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ALBERT COOPER AND DAVID PORTER

CIVIL DOCKET

Date		Proceedings
1972		
1	Sept 27	Complaint filed.
	Sept 27	Summons exit.
2	Nov. 29	Defts' motion to stay proceedings, notice and memorandum in support thereof, filed.
3	Dec. 20	Order that defts' motion for stay of proceedings is GRANTED, and that defts. shall file their answer to the complaint 30 days after final judgment in United States vs. Anderson, Crim. 71-602, filed. (12-21-72 entered and copies mailed)

1973		
4	Feb. 9	Summons returned "on 9-28-72 served L. Patrick Gray, 3d, John N. Mitchell, and U.S. Attorney General by registered mail; on 10-2-72 served U.S. Attorney; and *unserved* as to John Doe and Richard Doe" and filed.
5	June 19	Answer filed.
	June 19	CASE LISTED FOR TRIAL.
6	Jul. 19	Plff's interrogatories to defts., filed.
7	Aug. 10	Defts' objections to plff's interrogatories, filed.
9	Oct. 25	Plff's motion to compel answers to interrogatories, notice & memorandum in support thereof, filed.
10	Nov. 26	Deft's opposition to plff's motion to compel answers to interrogatories, filed.
1974		
11	June 13	Appearance of Jack Levine Esq. for Plffs. filed.
12	Sep. 13	Plff's reply memo in support of motion to compel answers to interr., filed.
13	Sep. 17	Order that defts. shall file for an in camera inspection full and complete answers to the interr. of plff. within 30 days of the date of this order etc., filed. 9/18/74 entered and copies mailed.
14	Sept. 19	Appearance of Jack J. Levine, Esq. for Plff., filed.
15	Oct. 4	Pre-Trial Order Broderick, J. fixing trial for 1/29/75 at 9:30 A.M., filed 10/7/74 entered and copies mailed
16	Oct. 16	Defts. motion for partial relief from order of 9-16-74, notice, and memorandum, filed.
1975		
17	Feb. 4	Pre-Trial Order Broderick, J. and fixing trial for 5/19/75 at 9:30 A.M., filed 2/5/75 entered and copies mailed

18	May 23	ORDER fixing 5/29/75 at 3:00 P.M. in Court chambers, Rm. 5008 for an in camera hearing etc., filed 5/27/75 entered and copies mailed
20	Jul 9	Plff's Second Set of Interrogatories to defts', filed
1975		
21	Jul 28	ORDER that all discovery in this matter be completed by 10/31/75 etc. and trial shall commence during the month of December 1975, filed 7/29/75 entered and copies mailed
23	Sept 12	Defts' Notice of In Camera Submission, filed
25	Sept 24	Plff's notice of taking the deposition of John N. Mitchell, filed
26	Nov 20	Plff's praecipe for the issuance of an Alias Summons as to Albert Cooper (John Doe) and E. Davis Porter (Richard Roe), filed
	Nov 20	ALIAS SUMMONS EXIT
27	Nov 26	ORDER that the deposition of John N. Mitchell be delivered to David Rudovsky, Esq. etc., filed 11-28-75 entered and copies mailed
28	Dec 9	ORDER that all discovery in this matter be completed by 12-15-75 etc.; Trial shall commence during the month of January and this Order supersedes the Court's Order of 7-25-75, filed 12-10-75 entered and copies mailed
29	Dec 10	ALIAS SUMMONS returned 11-26-75 served Albert Cooper (John Doe) and E. Davis Porter (Richard Roe), filed
30	Dec 22	Defts' Notice of In Camera Submission, filed
31	Dec 29	Report of Settlement Conference Broderick, J., filed

32	Dec 29	ORDER that both parties in this action will file cross-motions for summary judgment etc., filed 12-30-75 entered and copies mailed
33	Dec 30	Stipulation and Order substituting Albert Cooper and David Porter for John Doe and Richard Roe etc., filed
34	Dec 30	Stipulation and Order extending time to and including 1-16-76 for defts to respond to plff's Third Set of Interrogatories and Request for Production of Documents, filed
1976		
35	Feb. 11	Govt's notice of In Camera Submission with Certificate of Service, filed
36	Mar. 2	Stipulation and Order as to Plff's Damages, filed
37	Mar. 10	Appearance of Jack J. Levine, Esq. as counsel for Plff., filed.
38	Mar. 19	Defts' Motion for Summary Judgment, Certificate of Service, Statement of Material Facts as to which there is no genuine issue and Memorandum in support thereof, filed
39	Mar. 29	Defts' Notice of In Camera Submission, filed
40	Apr. 22	Plff's Cross-Motion for Summary Judgment and Response to defts' Statement of Material Facts as to which there is no Genuine Issue, filed
43	Jul. 6	Defts notice of filing response to plff's cross-motion for summary judgment in camera on July 6th, 1976, filed
44	Jul 8	Appearance of Jonathan M. Hyman Esq for plff., Keith Forsyth, filed.
45	Jul 16	Supplemental to Memorandum in support of defts' Motion for Summary Judgment—IMMUNITY, filed

46	Jul 26	Stipulation and Order dtd. 7-23-76 that the oral Protective Order entered on 5-29-75 be modified etc., filed
	Aug 2	Stipulation and Order that the following documents be made party of the record in C.A. 74-826: 1. Deposition Transcript of John N. Mitchell, 10-23-75, Washington, D.C.; 2. Plff's Third Set of Interrogatories to defts and Request for Production of Documents and 3. defts' Response In Camera to Plff's Third Set of Interrogatories to defts and Request for Production of Documents, filed (C.A. 74-826)
47	Sept 10	Deft's Notice of In Camera submission, filed
1977		
48	Mar 22	Govt's Notice of In Camera Submission, filed
49	Mar 28	Plff's Notice of In Camera Submission, filed
50	Oct 12	Memorandum on Recent Decision in support of defts' Motion for Summary Judgment, filed
1978		
51	Feb 14	MEMORANDUM BRODERICK, J. & ORDER that defts' motion for summary judgment and the plff's cross-motion for summary judgment are DENIED; that plff's claims under 47 U.S.C. § 605 and the Sixth Amendment are DISMISSED and the plff's claims against Richard G. Kleindienst and L. Patrick Gray, 3rd. are DISMISSED, filed 2/15/78 ENTERED & COPIES MAILED

52	Mar 13	ORDER that the ten-day period prescribed by Rule 37 of the Rules of Civil Procedure of this Court shall be enlarged to and including 3/17/78, to permit defts to move for reconsideration of the Memorandum and Order entered in this case on 2/15/78 etc., filed 3/14/78 ENTERED & COPIES MAILED
53	Mar 27	Defts' Motion for Reconsideration of its Memorandum Opinion and Order dtd. 2/15/78 or in the alternative for Certification and Memorandum in Support thereof, filed
54	Apr 17	NOTICE OF APPEAL OF THE DEFTS RECEIVED 4/17/78 AT 3:00 P.M., FILED 4/18/78 COPIES TO: David Rudovsky, Esq., David Kairys, Esq., Jonathan M. Hyman, Esq. Barbara Allen Babcock, Esq., Barbara B. O'Malley, Esq., Gordon W. Daiger, Esq., Edward S. Christenbury, Esq., Benjamin C. Flannagan, Esq. Wm. R. Hollifield, Esq. and U.S.C.A.
55	Apr 17	COPY OF CLERK'S NOTICE TO U.S. COURT OF APPEALS, FILED
56	May 8	Original record transmitted to U.S.C.A. (Papers #50, 51 not included) (U.S.C.A. No. 78-1611)
58	July 7	Defts' supplemental memorandum in support of defts' motion for reconsideration, filed.
59	Sept 5	Certified copy of Order received from U.S. Court of Appeals GRANTING Motion by appellants in NO. 78-1847 for stay of District Court Proceedings etc. pending disposition of appeal etc., filed

60	Nov 6	Plff's Reply to defts' Second Supplemental Memorandum and Notice of In Camera Submission, filed (IN CAMERA DOCUMENT)
61	Nov 6	Supplemental Memorandum (IN CAMERA) in support of defts' Motion for Summary Judgment and Notice of In Camera Submission, filed
62	Nov 6	Defts' Second Supplemental Memorandum (IN CAMERA) in support of their Motion for Summary Judgment, filed (IN CAMERA)
63	Nov 6	TRANSCRIPT OF DEPOSITION OF JOHN N. MITCHELL, FILED (IN CAMERA)
64	Nov 6	Defts' Response IN CAMERA to plff's Third Set of Interrogatories and Request for Production of Documents, filed (IN CAMERA)
65	Nov 6	Supplement (IN CAMERA) to defts' answers to plff's interrogtories filed for IN CAMERA inspection pursuant to the Court's Order of 9/16/74 with Certificate of Service, filed (IN CAMERA)
66	Nov 6	Plff's Cross-Motion for Summary Judgment, Plff's Response to defts' Material Facts as to which there is No Genuine Issue and Memorandum of Law in Support of Plff's Cross-Motion for Summary Judgment, filed (IN CAMERA)
67	Nov 6	Page 11 of defts' objections to plff's interrogatories etc. filed (IN CAMERA), filed
68	Nov 6	Defts' Answers to plff's interrogatories filed for IN CAMERA Inspection pursuant to the court's Order of 9/16/74, filed

69	Nov 6	Defts' Answers, IN CAMERA, to plff's Second Set of Interrogatories, filed (IN CAMERA)
	Nov 6	FIRST SUPPLEMENTAL RECORD TRANSMITTED TO USCA (Documents 60 thru 69 Inclusive filed IN CAMERA; Documents 58 & 59 NOT INCLUDED)
	Nov 14	SECOND SUPPLEMENTAL RECORD TRANSMITTED TO U.S. COURT OF APPEALS (PAPER NOS. 50 & 51) (USCA No. 78-1611)
1979		
70	Aug 13	Plff's Memorandum of Law in opposition to defts' Motion for Reconsideration or in the alternative for Certification, filed
71	Sept 5	Certified copy of Judgment in Lieu of formal mandate received from U.S. Court of Appeals that the Orders of the District Court filed Feb. 14, 1978 and March 22, 1978 are Affirmed insofar as the issue of derivative absolute immunity is concerned, and the causes be, and the same are hereby remanded to the District Court for further proceedings etc., filed
	Sept 5	RECORD ON APPEAL RETURNED.
1981		
72	Mar 24	ORDER PLACING THIS CASE INTO THE CIVIL SUSPENSE FILE—SUPREME COURT HAS GRANTED CERT; PARTIES ARE AWAITING COURT'S DECISION IN KISSINGER V. HALPERN ARGUED 12/8/80, FILED 3/24/81 ENTERED & COPIES MAILED
73	Nov 5	Report of Pretrial Conference Broderick, J., filed

74	Nov 13	ORDER DTD. 11/13/81 THAT A HEARING SHALL BE HELD ON 12/11/81 AT 9:30 A.M. IN COURTROOM 10-B FOR THE PURPOSE OF DETERMINING WHETHER THE ATTORNEY GENERAL AUTHORIZED THE WIRETAPS IN THIS CASE FOR THE PURPOSE OF OBTAINING INFORMATION TO INITIATE A CRIMINAL PROSECUTION, FILED 11/16/81 ENTERED & COPIES MAILED
75	Dec 2	ORDER DTD. 12/1/81 THAT THE HEARING PREVIOUSLY SCHEDULED FOR 12/11/81 IS RESCHEDULED TO 1/8/82 AT 9:30 A.M. IN COURTROOM 10-B, FILED 12/2/81 ENTERED & COPIES MAILED
1982		
76	Jan 5	Defts' prehearing memorandum on applicable law following remand, filed
77	Jan 6	Govt's Exhibits G-1, 2, 3 & 4, filed (FILED UNDER SEAL)
78	Jan 8	HEARING RE: Authorization of Wiretaps to determine purpose of obtaining information; Mr. Rudovsky to submit brief within next several days etc., filed
(77)	Feb 4	ORDER THAT GOVT'S EXHIBITS ARE SEALED & IMPOUNDED, FILED 2/5/82 ENTERED & COPIES TO COUNSEL (PLACED IN LOCK-UP—CABINET NO. 1)
79	Jul 20	Supplement to defts' prehearing memorandum on applicable law following remand, file

80	Nov. 12	MEMORANDUM AND ORDER THAT PLFF'S. MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY ONLY OF JOHN MITCHELL IS GRANTED. DEFTS. MOTION FOR SUMMARY JUDGMENT IS DENIED. TRIAL WILL BE HELD ON 12/15/82—FOR PURPOSE OF DETERMINING THE LIABILITY OF DEFTS. ALBERT COOPER AND DAVID PORTER, FBI AGENTS WHO CONDUCTED THE ELECTRONIC SURVEILLANCE AT ISSUE IN THIS CASE, FILED. 11/12/82 Entered & copies mailed
81	Nov 24	DEFTS' MOTION FOR CERTIFICATION AND FOR A STAY, MEMORANDUM IN SUPPORT, CERTIFICATE OF SERVICE, FILED.
82	Dec. 2	Plff's memorandum of law in opposition to defts' motion for certification and a stay, filed.

83	Dec. 3	MEMORANDUM, BRODERICK, J., AND ORDER THAT THE MOTION FOR CERTIFICATION FILED BY DEFTS, JOHN MITCHELL, ALBERT COOPER AND DAVID PORTER IS DENIED, THE MOTION FOR A STAY OF PROCEEDINGS PENDING CERTIFICATION FOR INTERLOCUTORY APPEAL IS DENIED, TRIAL IN THIS MATTER FOR THE PURPOSE OF DETERMINING THE LIABILITY OF DEFTS, ALBERT COOPER, ET AL, THE FBI AGENTS WHO CONDUCTED THE ELECTRONIC SURVEILLANCE AT ISSUE IN THIS CASE, AND FOR THE PURPOSE OF DETERMINING DAMAGES SUFFERED BY PLFF IS RESCHEDULED FOR 1-14-83 AT 9:30 A.M. IN COURTROOM 10-B U.S. COURTHOUSE, FILED. 12-6-82 Entered and copies mailed.
84	Dec. 10	MEMORANDUM, BRODERICK, J., AND ORDER, DATED 12-9-82, THAT THE PARTIES SHALL SUBMIT TO THIS COURT ON OR BEFORE 1-8-82 THEIR BRIEFS REGARDING THE APPLICABILITY OF TITLE III OF THE OMNIBUS CRIME CONTROL ACT OF 1968, TO DETERMINE THE DAMAGES AT ISSUE IN THIS LITIGATION AND, IF TITLE III IS NOT APPLICABLE, THE LAW THIS COURT SHOULD APPLY IN ASSESSING PLFF'S DAMAGES, FILED. 12-13-82 Entered and copies mailed.

85	Dec. 13	Defts' notice of appeal, filed. 12-14-82 Copies to: David Rudovsky, Esq., Jonathan M. Hyman, Esq. (USCA 82-1812)
86	Dec. 13	Copy of Clerk's notice to U.S. Court of Appeals, filed.
87	Dec. 13	Defts' notice of deposition of Keith Forsyth, filed.
88	Dec. 23	ORDER THAT THE TRIAL SCHEDULED FOR 1-14-83 IS RESCHEDULED FOR 1-24-83 AT 10:00 A.M. IN COURTROOM NO. 10-B, THE PARTIES SHALL SUBMIT THEIR BRIEFS REGARDING THE APPLICABILITY OF TITLE III OF THE OMNIBUS CRIME CONTROL ACT ON OR BEFORE 1-17-83, FILED. 12-23-82 Entered and copies mailed.
89	Dec. 27	Copy of Appellant's transcript purchase order, filed.
1983		
90	Jan. 3	STIPULATION AND ORDER THAT THIS ACTION AND ALL CLAIMS ASSERTED THEREIN SHALL BE DISMISSED WITH PREJUDICE AS TO DEFTS, ALBERT COOPER AND E. DAVIS PORTER, EACH SIDE TO BEAR ITS OWN COSTS, FILED. 1-4-83 Entered and copies mailed.
91	Jan. 18	ORDER THAT TRIAL OF THIS MATTER IS CONTINUED INDEFINITELY PENDING DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AS TO APPEALABILITY OF THIS COURT'S ORDER OF NOVEMBER 12, 1982, FILED. 1/19/83 Entered and copies mailed.

92	Jan. 21	CERTIFIED COPY OF ORDER FROM U.S. COURT OF APPEALS THAT THE DEFT'S MOTION FOR A STAY IS GRANTED; THE MOTION TO DISMISS THE APPEAL FROM DENIAL OF ABSOLUTE IMMUNITY IS DENIED, THE MOTION TO DISMISS THE APPEAL FROM THE DENIAL OF QUALIFIED IMMUNITY IS REFERRED TO THE MERITS PANEL, FILED. 1/21/83 entered
93	Feb. 9	Transcript of testimony of 1-8-82, filed.
	Feb. 9	RECORD COMPLETE FOR PURPOSES OF APPEAL.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 82-1812
Related Case 83-3150

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, L. PATRICK GRAY, 3RD, INDIVIDUALLY AND AS ACTING DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JOHN N. MITCHELL, INDIVIDUALLY AND AS FORMER ATTORNEY GENERAL OF THE UNITED STATES, JOHN DOE AND RICHARD ROE, ALBERT COOPER AND DAVID PORTER

JOHN N. MITCHELL, ALBERT COOPER, AND DAVID PORTER, APPELLANTS

DATE	FILINGS—PROCEEDINGS
1983	
Jan. 3	Motion by appee., Keith Forsyth, to dismiss appeal or in the alternative to allow proceedings on damages to continue in the district court, filed.
Jan. 10	Motion by aplt., John N. Mitchell, to stay trial scheduled by the district court to commence 1/24/83, with memorandum in support of aplt's motion to stay trial, *and* opposition to appee's motion to dismiss appeal, filed
Jan. 10	Submitted on above motions. Coram:
Jan. 14	Letter dated 1/12/83, from David Rudovsky, Esq., in response to aplt's motion to stay trial scheduled by the D.C., rec'd for the info. of the Court.

Jan. 20	Opinion Sur Grant of Stay (*Weis*, Sloviter and Becker) with separate dissenting opinion by Judge Sloviter, filed. Send to merits.
Jan. 20	Order (*Weis*, Sloviter and Becker, C.J.s.) granting defendant's motion for a stay; denying motion to dismiss the appeal from the denial of absolute immunity and referring the motion to dismiss the appeal from the denial of qualified immunity to the merits panel, filed. Send to merits.
Mar. 23	Statement by applt. of previous appeals purs. to Third Circuit Rule 21(1)(A)(d), filed. Send to merits panel.
Mar. 28	Motion by applt. to file corrected brief, w/svc., filed.
Mar. 30	Order (Clerk) granting above mot., filed.
Sept. 9	Letter dated 9/7/83, from Larry L. Gregg, Esq., counsel for applt.-pet., w/enclosures, rec'd for the info. of the Ct., filed. (Cvs. 82-1812 & 83-3150)
Mar. 25	Submitted on pet. for writ of mandamus. Coram: Hunter & Sloviter, C.J., and Gerry, D.J.)
Apr. 8	Order (*Hunter* and Sloviter, C.J., and Gerry, D.J.) consolidating pet. at 83-3150 w/appeal at 82-1812 and referring to the merits panel, filed. Send to merits.
Sept. 16	Ltr dated 9/14/83 from David Rudovsky, Esq., cnsel for applee, Forsyth, rec'd for the Court's info. (Cvs. 82-1812 & 83-3150)
Sept. 13	Court requested at oral argmt. counsel to have transcript of oral argmt. prepared (Cvs. 82-1812 & 83-3150)
Sept. 23	Copy of transcript of tape of oral argmt. held 9/13/83, rec'd at the dir. of the Court. (Cvs. 82-1812 & 83-3150)
Oct. 24	Ltr dated 10/21/83 from Larry L. Gregg, Esq., cnsel for applts, w/encl., recd. for the Court's info. (Cvs. 83-1812 and 83-3150)

Dec. 22 Ltr dtd 12/19/83 from Larry L. Gregg, Esq., cnsel for applts, w/encl., recd for the Crt's info. (Cvs. 82-1812 & 83-3150)

1984

Apr. 3 Order (Seitz, Ch.J., Aldisert, Adams, Gibbons, Hunter, Weis, Garth, *Higginbotham*, Sloviter and Becker, C.Js.) denying petition for rehrng. in banc. Judge Adams would grant rehrng. in banc because he believes the issues raised by the appeal are of sufficient importance to command the attention of the full court. Judge Hunter, Judge Weis and Judge Garth would grant the pet. for rehrng. (Cvs. 82-1812 & 83-3150)

Apr. 23 Motion by appellant-petitioner, John N. Mitchell to recall the mandate and stay the mandate pending application for certiorari, filed. (Cvs. 82-1812 and 83-3150)

May 8 Order (Weis, Higginbotham & Sloviter, C.Js.) recall the certified judgment in lieu of formal mandate, filed. (Cvs. 82-1812 & 83-3150)

June 1 Motion by appellant to extend stay of the mandate pending application for cert., w/serv., filed (Cvs. 82-1812 & 83-3150)

June 14 Order (Higginbotham, C.J.) granting further stay of mandate until 7-2-84, filed

June 27 Motion to extend stay of the mandate pending application for certiorari, w/serv., (Cvs. 82-1812 & 83-3150)

June 27 Letter dated 6-25-84 rec'd from S.C. advising that an order extending time in which to file pet. for cert. to and including 8/31/84 was filed, rec'd for info of (Cvs. 82-1812 & 83-3150)

June 29 Letter dated June 28, 1984 rec'd from Gordon W. Daiger, Esquire. (Cvs. 82-1812 and 83-3150)

July 6 Order (Higginbotham, C.J.) granting further stay of mandate until 8-31-84, filed (Cvs. 82-1812 & 83-3150)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 83-3150
Related Case 82-1812

KEITH FORSYTH, PLAINTIFF-RESPONDENT
HON. RAYMOND J. BRODERICK,
UNITED STATES DISTRICT JUDGE, NOMINAL RESPONDENT

v.

RICHARD G. KLEINDIENST, ET AL., DEFENDANTS
JOHN N. MITCHELL, DEFENDANT-PETITIONER

DATE	FILINGS—PROCEEDINGS
1983	
Mar. 25	Submitted on petition for writ of mandamus. Coram: Hunter and Sloviter, C.J. and Gerry, D.J.
Apr. 8	Order (*Hunter* and Sloviter, C.J., and Gerry, D.J.) consolidating petition at 83-3150 with the appeal at 82-1812 and referring to the merits panel, filed. Send to merits.
Sept. 9	Letter dated 9/7/83, from Larry L. Gregg, Esq., counsel for applt-pet., w/enclosures, rec'd for the info. of the Ct., filed (Cvs. 82-1812 & 83-3150)
Sept. 16	Letter dated 9/14/83 from David Rudovsky, Esq., counsel for applee, Forsyth, rec'd for the info. of the Ct. (Cvs. 82-1812 & 83-3150)
Sept. 13	Court requested at oral argmt. counsel to have transcript of oral argmt. prepared. (Cvs. 82-1812 & 83-3150)
Sept. 23	Copy of transcript of tape of oral argmt. held 9/13/83, rec'd at the dir. of the Court at oral argmt. (Cvs. 82-1812 & 83-3150)
Oct. 24	Ltr dated 10/21/83 from cnsel for pet., w/encl., recd. for the Court's info. (Cvs. 82-1812 and 83-3150)

Dec. 22	Ltr dtd 12/19/83 from Larry L. Gregg, Esq, ensel for pet, w/encl., recd for the Crt's info. (Cvs. 82-1812 & 83-3150)
1984	
Apr. 3	Order (Seitz, Ch.J., Aldisert, Adams, Gibbons, Hunter, Weis, Garth, *Higginbotham*, Sloviter and Becker, C.Js.) denying petition for rhrng. in banc. Judge Adams would grant rhrng. in banc because he believes the issues raised by the appeal are of sufficient importance to command the attention of the full court. Judge Hunter, Judge Weis and Judge Garth would grant the pet. for rehrng. (Cvs. 82-1812 & 83-3150)
Apr. 23	Motion by appellant-petitioner, John N. Mitchell to recall the mandate and stay the mandate pending application for certiorari, filed. (Cvs. 82-1812 and 83-3150)
May 8	Order (Weis, *Higginbotham* & Sloviter, C.Js.) recalling the certified judgment in lieu of formal mandate, filed. (Cvs. 82-1812 & 83-3150)
June 1	Motion by aplt. to extend stay of the mandate pending application for certiorari, w/serv., filed. (Cvs. 82-1812 & 83-3150)
June 14	Order (Higginbotham, C.J.) granting further stay of mandate to 7-2-84, filed.
June 27	Motion to extend stay of the mandate pending application for certiorari, w/serv., filed. (Cvs. 82-1812 & 83-3150)
June 27	Letter dated 6-25-84 from S.C. advising that an order extending time in which to file pet. for cert. to and including 8-31-84 was filed, rec'd for info of Court. (Cvs. 82-1812 & 83-3150)
June 29	Letter dated June 28, 1984 rec'd from Gordon W. Daiger, Esquire (Cvs. 82-1812 and 83-3150)
July 6	Order (Higginbotham, C.J.) granting further stay of mandate to 8-31-84, filed (Cvs. 82-1812 & 83-3150)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-1920

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, L. PATRICK GRAY, 3RD, INDIVIDUALLY AND AS ACTING DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JOHN N. MITCHELL, INDIVIDUALLY AND AS FORMER ATTORNEY GENERAL OF THE UNITED STATES, JOHN DOE AND RICHARD ROE

JURY TRIAL WAIVED

COMPLAINT

1. This action is brought by plaintiff Keith Forsyth for compensatory and punitive damages occasioned by defendants' unauthorized and illegal electronic surveillance, overhearing, interception, use and disclosure of plaintiff's oral and wire communications in violation of plaintiff's rights to privacy, free speech, association, counsel and political expression.

JURISDICTION

2. This action arises under the First, Fourth, Sixth and Ninth Amendments to the Constitution of the United States and 28 U.S.C. § 2520. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and § 1343(4), 18 U.S.C. § 2520, 42 U.S.C. § 1985, 47 U.S.C. § 605 and the aforementioned constitutional provisions.

3. The matter in controversy, exclusive of interest and costs, exceeds the value of Ten Thousand Dollars ($10,000.00).

PARTIES

4. Plaintiff Keith Forsyth is a citizen of the United States and resident of the Commonwealth of Pennsylvania.

5. Defendant Richard G. Kleindienst is the Attorney General of the United States and the executive head of the Department of Justice. He is sued individually and in his official capacity.

6. Defendant L. Patrick Gray, 3rd is Acting Director of the Federal Bureau of Investigation. He is sued individually and in his official capacity.

7. Defendant John N. Mitchell is a former Attorney General of the United States. He is sued individually and in his former official capacity.

8. John Doe and Richard Roe are unknown agents or employees of the defendants who, through illegal electronic surveillance intercepted, overheard, used and subsequently disclosed the wire and oral communications of plaintiff Forsyth.

CAUSE OF ACTION

9. Plaintiff Keith Forsyth is a defendant in *United States of America* v. *Anderson, et al.* United States District Court for the District of New Jersey, Cr. No. 602-71. On March 15, 1972 plaintiff Forsyth, through his attorney, filed a Motion for Disclosure of Electronic Surveillance, etc., pursuant to 18 U.S.C. § 3504, requiring the Government to "affirm or deny the occurrence" of unlawful wiretapping or other electronic surveillance.

10. In response to this Motion the Government filed an Answer (Government's Opposition to Motion for Disclosure of Electronic Surveillance and a Pre-Trial Hearing to Suppress Evidence) which, in pertinent part, represented:

> "A review of the records of the Department of Justice has established that none of the movants in this matter were the subject of direct electronic surveillance, nor were any premises in which they had a proprietary interest. However, said defendants Robert Williamson and Keith Forsyth did participate in conversations that are unrelated to this case and which were overheard by the Federal Government during the course of

> electronic surveillance expressly authorized by the President acting through the Attorney General. Such surveillance was deemed necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. (18 U.S.C. 2511(3))." *govrnment's Opposition* at 2-3.

11. The Government also submitted an Affidavit of the Attorney General of the United States (defendant Kleindienst) asserting, *inter alia*, that "said electronic surveillance was authorized by the President of the United States, acting through the Attorney General, in the exercise of his authority relating to the national security as set forth in 18 U.S.C. 2511(3)." A copy of this affidavit is attached to this Complaint. (Exhibit "A")

12. Said electronic surveillance was in violation of federal law and the Constitution of the United States.

13. The defendants have disclosed and used the above described illegally intercepted oral communications and have procured their agents to intercept, disclose and use these oral and wire communications.

14. Upon information and belief the oral and wire communications intercepted by the defendants included communications with plaintiff's legal counsel.

15. Upon information and belief the oral and wire communications intercepted by the defendants were communications concerning political activity protected by the First Amendment.

16. The actions of the defendants, their agents and employees, and in particular their unauthorized and illegal electronic surveillance, overhearing, interception, use and disclosure of plaintiff's oral and wire communications, violated plaintiff's right to privacy under the Fourth and Ninth Amendments, his right to free speech, association and political expression under the First Amendment; his right to counsel under the Sixth Amendment and were in violation of plaintiff's rights under 18 U.S.C. §§ 2510-2520 and 47 U.S.C. § 605.

17. Said interceptions, overhearing, use and disclosure of plaintiff's oral and wire communications were not made in

good faith reliance on a court order or legislative authorization.

WHEREFORE, Plaintiff Forsyth respectfully requests the following relief:

1. A judgment in the amount of $100.00 a day for each day the defendants violated plaintiff's rights under Chapter 119, 18 U.S.C. or $1,00.00 whichever is higher, pursuant to 18 U.S.C. § 2520(a);

2. A judgment in the amount of $25,000.00 for the violation of plaintiff's rights under the First, Fourth, Sixth and Ninth Amendments.

3. Punitive damages in the amount of $50,000.00

4. Reasonable attorney's fees and other litigation costs reasonably incurred, pursuant to 18 U.S.C. § 2520(c).

5. Such other and further relief which may appear to be just and proper.

Respectfully submitted,

/s/ David Rudovsky

DAVID RUDOVSKY
DAVID KAIRYS
Philadelphia Counsel for National Emergency Civil Liberties Committee
1427 Walnut Street
Philadelphia, Pa. 19102

Of Counsel:

KAIRYS & RUDOVSKY
1427 Walnut St.
Philadelphia, Pa. 19102

SEPTEMBER 26, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Criminal No. 602-71

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILLIAM ANDERSON, ET AL., DEFENDANT

AFFIDAVIT OF THE ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

RICHARD G. KLEINDIENST, being duly sworn deposes and says:

1. I am the Acting Attorney General of the United States.

2. I submit this affidavit in connection with the opposition of the United States of America to the disclosure to defendants Robert Williamson and Keith Forsyth of information concerning overhearings of their voices which occurred during the course of national security electronic surveillance. In addition to other pertinent information, the sealed exhibit submitted herewith for *in camera* inspection contains a description of the premises which were the subject of such electronic surveillance.

3. Said electronic surveillance was authorized by the President of the United States, acting through the Attorney General, in the exercise of his authority relating to the national security as set forth in 18 U.S.C. 2511(3). The authorization for such surveillance was in response to the request of the Director of the Federal Bureau of Investigation, which request was considered in conjunction with all of the foreign and domestic intelligence available to the Executive Branch of the Government.

4. I certify that it would be a practical impossibility to submit to the court all of the facts, circumstances, and other considerations upon which this authorization was

based. I further certify that it would prejudice the national interest to disclose the particular facts contained in the sealed exhibit and concerning the surveillance other than to the court, *in camera*.

5. I respectfully request the court to treat the contents of the sealed exhibit with the same dignity for security purposes as they were treated in submission to the court and to return said exhibit to the Department of Justice at the conclusion of its hearing on this matter. The Department of Justice will retain said exhibit under the seal of the court subject to any further orders of this court or other court of competent jurisdiction.

/s/ Richard G. Kleindienst
RICHARD G. KLEINDIENST
Acting Attorney General
of the United States

Subscribed and sworn to before B. Landsberger, Notary Public, on this 11th day of April, 1972.

My Commission expires June 30, 1976.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-1920

KEITH FORSYTH, PLAINTIFF,

v.

RICHARD G. KLEINDIENST, ET AL., DEFENDANTS.

ANSWER TO COMPLAINT

Defendants, by their undersigned attorneys, in answer to the Complaint herein filed, say:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The doctrine of sovereign immunity bars any suit against the United States where the United States has not consented to be sued. This suit is barred by the doctrine of sovereign immunity since it is in law and fact a suit against the United States to which the United States has not consented.

THIRD DEFENSE

From January 20, 1969 to March 1, 1972 defendant John N. Mitchell was the Attorney General of the United States. On March 2, 1972 defendant Richard G. Kleindienst became the Acting Attorney General of the United States and between June 12, 1972 and May 25, 1973 was the Attorney General of the United States. On May 25, 1973 Elliot L. Richardson became the Attorney General of the United States. Until May 2, 1972 J. Edgar Hoover was the Director of the Federal Bureau of Investigation. Between May 3, 1972 and April 27, 1973 defendant L. Patrick Gray, III was the Acting Director of the Federal Bureau of Investigation.

On April 30, 1973 William D. Ruckelshaus became the Acting Director of the Federal Bureau of Investigation. All activities of the defendants in the premises were performed in furtherance of their official duties, were within the scope of their authority, and were not in excess of their statutory authority. The defendants are, therefore, absolutely immune from civil liability therefor under the doctrine of official immunity.

FOURTH DEFENSE

From January 20, 1969 to March 1, 1972 defendant John N. Mitchell was the Attorney General of the United States. On March 2, 1972 defendant Richard G. Kleindienst became Acting Attorney General of the United States and between June 12, 1972 and May 25, 1973 was the Attorney General of the United States. On May 25, 1973 Elliot L. Richardson became the Attorney General of the United States. Until May 2, 1972 J. Edgar Hoover was the Director of the Federal Bureau of Investigation. Between May 3, 1972 and April 27, 1973 defendant L. Patrick Gray, III was the Acting Director of the Federal Bureau of Investigation. On April 30, 1973 William D. Ruckelshaus became the Acting Director of the Federal Bureau of Investigation. All activities of the defendants in the premises were performed in furtherance of their official duties, were undertaken in good faith and in the reasonable belief that such activities were necessary, lawful, and within the scope of their authority. Defenants are, therefore, not liable to the plaintiff in damages for such activity.

FIFTH DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SIXTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Complaint, the defendants aver:

1. Defendants admit that conversations of plaintiff were incidentally overheard on national security electronic surveillance of another conducted by the Federal Bureau of In-

vestigation which surveillance was authorized and approved by the then Attorney General of the United States, defendant John N. Mitchell, acting for the President of the United States, to gather intelligence information in the exercise of his authority relating to the national security as set forth in 18 U.S.C. § 2511(3). Defendants deny that any electronic surveillance was directed at the plaintiff or that such surveillance occurred on premises owned, leased or licensed by plaintiff. Defendants deny that defendants or their agents have in any manner disclosed or used said overheard conversations of the plaintiff. Defendants deny that any action has been taken by defendants or their agents against plaintiff which is actionable in a suit for violation of plaintiff's constitutional or other legal rights and further deny that plaintiff is entitled to judicial relief against defendants in any form or manner.

2. Defendants deny the allegations contained in the first sentence of paragraph 2 of the Complaint, and further deny that the Court has jurisdiction over this case under 28 U.S.C. §§ 1331, 1343(4), 18 U.S.C. § 2520, 42 U.S.C. § 1985, 47 U.S.C. § 605, the First, Fourth or Ninth Amendments to the Constitution of the United States, or otherwise.

3. Defendants deny the allegations contained in paragraph 3 of the Complaint.

4. Defendants admit the allegations contained in paragraph 4 of the Complaint.

5. Defendants admit that between June 12, 1972 and May 25, 1973 Richard G. Kleindienst was the Attorney General of the United States. Defendants deny that any action has been taken by defendant Kleindienst against plaintiff which is actionable in a suit for violation of his constitutional or other legal rights and further deny that plaintiff is entitled to judicial relief against him in any form or manner.

6. Defendants admit that between May 3, 1972 and April 27, 1973 L. Patrick Gray, III was the Acting Director of the Federal Bureau of Investigation. Defendants deny that any action has been taken by defendant Gray against plaintiff which is actionable in a suit for violation of his constitu-

tional or other legal rights and further deny that plaintiff is entitled to judicial relief against him in any form or manner.

7. Defendants admit that between January 20, 1969 and March 1, 1972 John N. Mitchell was the Attorney General of the United States. Defendants deny that any action has been taken by defendant Mitchell against plaintiff which is actionable in a suit for violation of his constitutional or other legal rights and further deny that plaintiff is entitled to judicial relief against him in any form or manner.

8. Defendants deny that any person acting at the behest of the defendants have taken any action against plaintiff which is actionable in a suit for violation of his constitutional or other legal rights.

9.-11. Defendants admit the allegations contained in paragraphs 9 through 11 of the Complaint.

12. Defendants deny the legal conclusions contained in paragraph 12 of the Complaint; and further deny that any action has been taken by defendants against plaintiff which is actionable in a suit for violation of plaintiff's constitutional or other legal rights.

13. Defendants deny the legal conclusions contained in paragraph 13 of the Complaint; and further deny that said defendants or their agents have in any manner disclosed or used any conversations of plaintiff incidentally overheard in the electronic surveillance of another authorized by the then Attorney General of the United States, defendant John N. Mitchell, acting for the President of the United States, to gather intelligence information in the exercise of his authority relating to the national security as set forth in 18 U.S.C. § 2511(3).

14.-15. Defendants deny the allegations contained in paragraphs 14 and 15 of the Complaint.

16. Defendants deny that any action has been taken by defendants against plaintiff which is actionable in a suit for violation of plaintiff's constitutional or other legal rights; and further deny that any person acting at the behest of the defendants has taken any action against plaintiff which is actionable in a suit for violation of his constitutional or

other legal rights. Accordingly, defendants deny the allegations contained in paragraph 16 of the Complaint.

17. Defendants admit that such surveillance was not conducted pursuant to a court order, but assert that such surveillance was conducted in a good faith reliance upon the legislative recognition of such authority set forth in 18 U.S.C. § 2511(3). Accordingly, defendants deny the remaining allegations contained in paragraph 17 of the Complaint.

WHEREFORE, the defendants, having fully answered the allegations contained in the numbered paragraphs of the Complaint, respectfully pray that the Complaint herein is dismissed.

Respectfully submitted,

HENRY E. PETERSEN
Assistant Attorney General

/s/ Edward S. Christenbury
EDWARD S. CHRISTENBURY
Attorney, Department of Justice

/s/ Benjamin C. Flannagan
BENJAMIN C. FLANNAGAN
Attorney, Department of Justice

/s/ William R. Hollifield
WILLIAM R. HOLLIFIELD
Attorney, Department of Justice
Washington, D.C. 20530
Phone: 202-739-3032

Attorneys for defendant Mitchell in his official capacity as former Attorney General of the United States and for defendants Kleindienst and Gray.

/s/ Robert E.J. Curran
ROBERT E. J. CURRAN
United States Attorney

/s/ Michael B.L. Hepps
MICHAEL B.L. HEPPS
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 69 CR 180

UNITED STATES OF AMERICA

v.

DAVID T. DELLINGER, ET AL., DEFENDANTS

BEFORE JUDGE HOFFMAN,
FRIDAY, FEBRUARY 20, 1970,
10:00 O'CLOCK A.M.

RESUMED PURSUANT TO ADJOURNMENT.

PRESENT:

MR. FORAN
MR. CUBBAGE
MR. SCHULTZ
MR. EPSTEIN
MR. CONNOLLY
MR. KUNSTLER
MR. WEINGLASS

THE COURT: After the indictment in this case was returned, but before trial, the defendants moved for an order directing the government to disclose to them any and all logs, records and memoranda of any electronic surveillance directed at any defendant or any unindicted coconspirator, or upon the premises thereof, and for an evidentiary hearing to determine whether any of the evidence upon which the indictment was based or which the government intended to use at the trial was tainted by such surveillance.

In response, the government admitted that the conversations of certain of the defendants had been overheard during the course of electronic surveillance, but contended that such surveillance was not unlawful, and that disclosure of the record of such surveillance was not required. The government disclosed to the defendants records of certain surveillance operations and submitted to the court sealed ex-

hibits containing the records of other surveillance operations for in camera examination by the court, pursuant to an affidavit of the Attorney General of the United States which stated that the disclosure of the latter exhibits would endanger the national security of the United States.

As the record reveals, the court determined, or, rather decided to defer determination of this matter until after trial. Five of the original eight defendants having been found guilty by the jury under single counts of the indictment, it now is necessary to deal with this matter.

The Supreme Court of the United States has recently held that where electronic surveillance is found to have been unlawful and if a defendant is found to have standing to object to that surveillance, the government must disclose to him the records of overhead conversations which it is not entitled to use in building its case against him. Alderman v. United States, 394 U.S. 165, 180-85, 1969.

Before such disclosure is required, there must be a finding that the surveillance was unlawful and that the defendant has standing to object. Clearly the defendants here have no standing to object to surveillance directed against their co-defendants or against their co-conspirators as expressly held in Alderman, 394 U.S. at 171-76.

It is equally clear, however, that under Alderman each of the convicted defendants has the requisite standing with respect to surveillance in which his own conversations were overheard.

There remains the question of [whether] the surveillance was lawful, since a finding by the court that the surveillance was lawful would make disclosure and further proceedings unnecessary. Giordano v. United States, 394 U.S. 310, 313, 1969.

The determination of the legality of the surveillance can appropriately be made in ex parte in camera proceedings. Giordano v. United States, 394 U.S. at 314. Justice Stewart, concurring. United States v. Battaglia, 410 F.2d 279, 7th Circuit, 1969.

The threshold question, then, is whether the electronic surveillance, during the course of which the conversations

of the defendants were overheard, was or was not lawful. The Fourth Amendment to the Constitution of the United States prohibits "unreasonable searches and seizures," and therefore under the exclusionary rule of Weeks vs. United States, 232 U.S. 383, 1914, evidence seized from a defendant in violation of his Fourth Amendment rights may not be used at trial.

Fruits of such unlawful searches are excluded as well. Silverthorne Lumber Company vs. United States, 251 U.S. 385, 1920.

And "because the amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. Silverman vs. United States, 365 U.S. 505, 1961; Katz vs United States, 389 U.S. 347, 19674.

Moreover, the exclusionary rule applies to violations of Section 605 of the Communications Act of 1934, 47 U.S.C. Section 605, which prohibits the interception and divulgence of telephone conversations without the authorization of the sender. Nardone vs. United States, 302 U.S. 379, 1937. Nardone vs. United States, 308 U.S. 338, 1939.

It is the position of the Government that while the surveillance in question here may not in all instances comply with the broad rules enunciated by the foregoing cases, it should be declared lawful on the ground that there is an exception from the warrant requirements for surveillance authorized by the President or the Attorney General for the purpose of "national security" investigations. An affidavit of the Attorney General submitted to the court with the sealed exhibits states that conversations of the defendant "were overheard by Government agents who were monitoring wiretaps which were being employed to gather foreign intelligence information, or to gather intelligence information concerning domestic organizations which seek to use force and other unlawful means to attack and subvert the existing structure of the Government.

"The records of the Department of Justice reflect that in each instance the installation of wiretaps involved had been expressly approved by the then Attorney General." The defendants argue that there is no such "national security ex-

ception" to the search and seizure rules and that the surveillance carried out by the Government was therefore unlawful. This issue was fully briefed and argued by counsel for the respective parties before trial and I am now prepared to decide it.

The Supreme Court has not addressed itself to the question of whether authorization by other than magistrate—such as by the President or by the Attorney General—would satisfy the Fourth Amendment in a situation involving national security. The question was specifically reserved in Katz vs. United States, 389 U.S. 347, 358, Note 23.

The issue was also raised though not decided, in United States v. Stone, No. 68 CR 1233, an unreported memorandum of decision, United States District Court for the District of Columbia, September 15, 1969. Mr. Justice White concurring in Katz said:

> "... there are circumstances in which it is reasonable to search without a warrant ... Wire tapping to protect the security of the nation has been authorized by successive Presidents ... We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized the electronic surveillance as reasonable."

Mr. Justice Douglas, joined by Mr. Justice Brennan, also concurring in Katz, expressed contrary views, 389 U.S. at 359-60.

Thus, aside from the views expressed by three Justices, the question at hand is one of first impression. The purpose of the Fourth Amendment proscription of unreasonable searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasion by government officials, and, except in certain carefully defined classes of cases, a search is "unreasonable" unless it has been authorized by a valid search warrant. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 528-29, 1967.

There are, however, certain situations in which a warrant is not required and in assessing whether the public in-

terest demands creation of a general exception to the Fourth Amendment warrant requirement, the question is whether the authority to search should be evidenced by a warrant. Camara v. Municipal Court, 387 U.S. at 533.

In making that assessment, it is appropriate to bear in mind the purpose that is served by requiring a warrant before a search may be conducted. The function of the warrant requirement for searches is the same as for arrests: to insure that the deliberate impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. Wong Sun v. United States, 371 U.S. 471, 481-82, 1963.

In most criminal investigations, it is both appropriate and feasible for a judicial officer, such as a magistrate, to make an independent determination of whether there is probable cause for a search—or to conduct electronic surveillance. It does not necessarily follow, however, that in all cases this warrant procedure should be required. The gathering of intelligence vital to the preservation of national security, whether deemed necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, or to protect the United States against a clear and present danger to the structure or the existence of its Government, involves considerations of involved factual and policy matters that are uniquely within the competence of the executive branch of the Government. For that reason I agree with the conclusion reached by Judge Ingraham of the Southern District of Texas, in the case of the United States vs. Clay, criminal number 67 §94, a memorandum opinion, July 14, 1969, from which I quote:

> "... it is the executive, not the judiciary, which alone possesses both the expertise and the factual background to assess the reasonable-practical standpoint, it would be ridiculous to place on a United States Commissioner the burden of deciding what is and is not a threat to national security. The court does not believe the judiciary should question the decision of the executive department that such surveillances are

> reasonable and necessary to the protection of the national interest."

There have been other cases upon which courts have deferred to the executive in matters, the determination of which is more suitably left to that branch of government. In C&S Airlines, Incorporated vs. Waterman Steamship Corporation, 333 U.S. 103, 111, 1948, the Supreme Court said "The President has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevent information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

And the Court said in Coleman vs. Miller, 307 U.S. 433, 455, 1939:

> "There are many illustrations in the field of foreign relations where there are considerations of policy considerations of extreme magnitude and certainly.... incompetent to the examination and decision of a court of justice."

See also Dakota Central Telephone Company vs. South Dakota, 250 U.S. 163, 1919.

Thus, because the matter of when electronic surveillance is reasonably necessary to investigations carried out to protect the national security is a matter not suitable for a judicial determination, but is rather best left to the authorization of the President or his chief legal officer, the Attorney General, I conclude that electronic surveillance in national security cases is not subject to the warrant requirements of the Fourth Amendment.

The remaining question is whether electronic surveillance conducted solely for the purpose of gathering foreign intelligence information, or to gather intelligence information concerning domestic organizations which seek to use force and other unlawful means to attack and subvert the existing structure of the Government, violates Section 605 of the Federal Communications Act.

There, like the Constitutional issue, is an "open question" not yet decided by the Supreme Court. United States vs. Stone, No. 68 CR 1233, District Court of the District of Co-

lumbia, an unreported memorandum of decision, September 15, 1969.

In Nardone vs. United States, 302, U.S. 380, 1937, the Court held that wiretap evidence acquired by the Federal officers was inadmissible at a criminal trial under Section 605.

The Government takes the position that Section 605 does not limit the power of the President to authorize wiretapping for the purpose of gathering intelligence information to preserve the national security. The merit of this position is evidence of the fact that nothing in the legislative history of the Federal Communications Act indicates that Congress intended to prohibit electronic surveillance authorized by the Attorney General for such purposes. The Nardone case reflects no awareness of the problem of the need to gather intelligence information and the need to keep those activities secret. In view of the President's primary responsibility for preserving the national security, it would be unreasonable to conclude that either the Congress in enacting Section 605 or the Supreme Court in deciding Nardone, obtain information vital to the fulfillment of his responsibilities. This interpretation of Congressional intent is borne out by the recently enacted Omnibus Crime Control and Safe Streets Act of 1968, which specifically exempts from its own restrictions and those of the Federal Communications Act and wiretapping authorized pursuant to the Constitutional power of the President to "protect the nation against actual or potential attack or other hostile acts of a foreign power to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security against foreign intelligence activities, and to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."

I have carefully examained the surveillance records and the authorization memoranda contained in the sealed exhibits submitted by the Government to the court in camera and I find that the electronic surveillance that was con-

ducted was expressly authorized by the Attorney General for the purpose of gathering intelligence information.

For the reasons I have just set forth, I therefore conclude that the surveillance was lawful and consequently not subject to the disclosure requirements of Alderman vs. United States.

Mr. Clerk, the motion of the defendants for disclosure of electronic surveillance records and for hearing to determine whether their conviction was tainted by such surveillance will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. KC-CR-1204

UNITED STATES OF AMERICA, PLAINTIFF,

v.

FELIX LINDSEY O'NEAL a/k/a PETE O'NEAL, DEFENDANT.

TRANSCRIPT OF PROCEEDINGS

Appearances:

HON. ARTHUR J. STANLEY, JR.,
Chief Judge, Presiding.

For the Plaintiff:

MR. ROBERT ROTH,
United States Attorney,
Kansas City, Kansas.

MR. JAMES A. FUSATERI,
Assistant U.S. Attorney,
Kansas City, Kansas.

For the Defendant:

MR. AUSTIN F. SHUTE,
845 Law Building,
Kansas City, Missouri.

MR. MICHAEL LERNER,
747 Ann Avenue,
Kansas City, Kansas.

Harold Pittel,
Official Reporter.

BE IT REMEMBERED, on the 1st, 2nd and 3rd days of September, 1970, the above matter coming on for hearing before the Honorable Arthur J. Stanley, Jr., Chief Judge of the United States District Court for the District of Kansas.

MORNING SESSION, TUESDAY, SEPTEMBER 1, 1970

(Whereupon, the following proceedings were had OUT OF THE PRESENCE AND HEARING OF THE JURY PANEL:)

THE COURT: We will be on the record in Case No. KC-CR-1204, United States, vs. Felix Lindsey O'Neal. I understand that counsel had some matter to take up with the Court and I want to take this opportunity, first, because this might be of some significance to counsel in the voir-dire examination, the defendant's motion to require the government to elect between Counts 1 and 3 will be denied since the evidence required to establish the one count, the charge in the one count, would differ from that to be charged in the other.

I have examined in camera the logs of the telephone, intercepted telephone conversations, and I find that all of the interceptions were after the effective date of the Crime Control Act and all were after the date of January 16, 1969, the date the offense is alleged to have been committed and that none of them have any significance with respect to the offenses charged in the three counts in this case and that all were authorized by the President acting through the Attorney General. The case of Alderman versus United States, 394 U.S. 165, has to do with disclosure to the defense of intercepted communications illegally obtained and I hold here and rule that all of the interceptions, the wire taps, in this case, those logs of which were submitted to the Court for in-camera examination, were legally obtained within the inherent constitutional powers of the President because of his responsibility to gather intelligence information having to do with matters vital to national security and in connection with that, I cite the case of United States versus Clay, Fifth Circuit, not yet published, so far as I know, an opinion handed down July 6, 1970, and United States versus O'Baugh, a decision of the District Court of the District of Columbia, I think not published, case in that court numbered CR-1529-67, the decision being dated September 30, 1969. So the logs of the interceptions will be sealed by the Court and returned to the Attorney General where in the

words of Attorney General Mitchell's affidavit, they will be retained under seal so they may be submitted to any appellate court that may review this matter.

Now, if you will forgive me for taking up my matters before I ask you what it was that you wished to take up with the Court, I would ask the defense at whatever time you feel appropriate, Mr. Shute, to assist me in preparation of the instructions, to advise me whether you claim that any of the exceptions under Section 922(a)3 are applicable here, that is, [151] whether you will contend that the defendant is a licensed importer, dealer, et cetera, whether he obtained the gun charged, if he did obtain it, as a bequest or through interstate succession or whether the purchase was authorized under Missouri law or whether it was loaned, the weapon was loaned, or rented for lawful sporting purposes or whether it was lost—whether he had lost a gun in Kansas while engaged in a match or in hunting activities.

MR. SHUTE: Yes, yes.

THE COURT: As I understand, I believe this to be the rule, in this circuit at least, the burden is on the defendant to bring himself within any exception in the statute. If there is any such exception urged, I'll have to prepare to instruct on it.

MR. SHUTE: Are you asking me for that now, Your Honor?

THE COURT: Now or whenever you feel that it is appropriate to tell me. I'll be working on the instructions probably nights.

MR. SHUTE: The only possible exception, Your Honor, would be such a purchase in the State of Missouri would be lawful.

THE COURT: Do you have—

MR. SHUTE: I frankly have tried to see

Supreme Court of the United States

No. 84-335

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

ORDER ALLOWING CERTIORARI. Filed October 29, 1984.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

Justice Rehnquist took no part in the consideration or decision of this petition.